#94-105

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the People of the	)	
State of California and the	)	PR File No. 94
Public Utilities Commission of	)	
the State of California to Retain	)	
Regulatory Authority Over	)	
Intrastate Cellular Service Rates	)	

To: The Commission

REPLY COMMENTS OF McCAW CELLULAR COMMUNICATIONS, INC.

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October 19, 1994

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In the Matter of	)	
	)	
Petition of the People of the	)	
State of California and the	)	PR Docket No. 94-105
Public Utilities Commission of	)	PR File No. 94-SP3
the State of California to Retain	)	
Regulatory Authority Over	)	
Intrastate Cellular Service Rates	)	

To: The Commission

REPLY COMMENTS OF McCAW CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw"),[1/] by its attorneys, hereby submits its reply comments in connection with the above-captioned petition ("CPUC Petition").

INTRODUCTION AND SUMMARY

In the Second Report and Order,[2/] the Commission established a sound regulatory foundation for the continued growth and development of commercial mobile radio services ("CMRS"). The Commission correctly concluded in that proceeding that existing market conditions, together with enforcement of other provisions of Title II, render tariffing and rate regulation unnecessary to ensure that CMRS prices are just and nondiscriminatory or to protect consumers. The Commission found that imposing these requirements on cellular and other CMRS providers would not serve

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1/ On September 19, 1994, McCaw merged with AT&T Corp.

2/ In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411 (1994) ("Second Report and Order").

the public interest, and that forbearance from unnecessary regulation of CMRS providers would enhance competition in the mobile services market.[3/] Finally, the Commission ensured that like mobile radio services would be subject to consistent regulatory treatment.

In its initial comments on the various state petitions to extend the rate regulation of CMRS, McCaw argued that the basic framework established by Section 332(c) and the Second Report and Order required three separate showings in support of continued regulation. First, the petitioning state must show that market conditions unique to that state are substantially less competitive and substantially more likely to cause harm to consumers than the market conditions that have been found generally to support the Commission's decision to forbear from rate and tariff regulation. Second, since the Commission expressly relied upon the continuing availability of federal remedies under the Communications Act, a petitioning state must demonstrate that whatever unique competitive problems it has identified cannot be adequately addressed through these remedies. Third, in the unlikely event that a state can make the showings described above, it must also show that any marginal benefits of the proposed state regulation outweigh the substantial costs associated with regulation.

Two parties with a vested interest in maintaining disparate and burdensome regulation of cellular carriers, the National Cellular Resellers Association ("NCRA") and Nextel Communications,

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[3/] Id. at 1467.

Inc. ("Nextel") have filed generic comments in support of the above-captioned petitions to retain or impose regulation of CMRS providers. Their comments read as if the Second Report and Order was never adopted. On the basis of general and unsubstantiated assertions with respect to the state of competition in cellular markets, both parties would have the Commission sanction the regulatory disparities that the amendment of Section 332(c) was intended to redress. Neither NCRA nor Nextel presents a scintilla of evidence that might be considered by the Commission in determining whether any of the states have met their statutory and regulatory burden of proof to justify continued rate regulation of CMRS. As such, these comments are simply irrelevant to the detailed showings required in this proceeding.

Nextel also attempts to resurrect arguments that it has previously made, which attempt to justify regulation of cellular carriers based on their supposed "dominant" status. Both Congress and the Commission have rejected differences in regulatory treatment based on dominant/non-dominant distinctions. Rather, Section 332 sets forth a clear standard that must be met by a state seeking to regulate CMRS providers in general or cellular carriers in particular, and this standard is not met simply by trumpeting the fact that the Commission has never explicitly found cellular licensees to be non-dominant carriers.

In its opposition to the CPUC Petition, McCaw provided extensive economic evidence that cellular markets in California are competitive, as evidenced by expanding service and declining

prices, and that the CPUC's economic analysis attempting to establish the contrary is entirely unsupported and wrong. Moreover, McCaw provided compelling economic evidence that one of the fundamental underpinnings of California's regulatory regime, the protection of resellers, is fundamentally misguided and provides no benefits to consumers.

Four parties have filed comments in support of the CPUC Petition. Predictably, two of these parties, the Cellular Reseller's Association ("CRA"), et al. and the Cellular Agent's Trade Association ("CATA"), seek the continuance of a regulatory regime which directly benefits them. These parties barely clothe their concerns over the loss of California's protectionist regime with the rhetoric of the public interest, and provide no economic evidence whatsoever in support of the CPUC Petition.

The supporting comments of the two other parties, Utility Consumer's Action Network ("UCAN"), et al. and The County of Los Angeles ("Los Angeles County"), suffer from similar defects. The gist of these comments is simply that cellular rates are somehow "too high" which, in these parties' view, somehow must be evidence of lack of competition. Subjective evaluation of what cellular service "should" cost is not evidence, however. To the limited extent that these parties go beyond recitation of their subjective beliefs, they merely reiterate the flawed economic precepts and analysis set forth in the CPUC's petition. These precepts and analysis were conclusively dismantled in McCaw's original opposition.

Finally, the information that the CPUC publicly disclosed after it filed its Petition lends no support to its effort to extend its rate regulation of cellular carriers. To the contrary, review of that information reveals significant flaws in the CPUC's analysis of the CMRS marketplace.

I. NEITHER NCRA AND NEXTEL HAVE PROVIDED ANY EVIDENCE IN SUPPORT OF THE CPUC'S PETITION

The comments of NCRA and Nextel argue in the most general terms that competitive conditions in cellular markets are such that the states should be permitted to regulate cellular rates. The time for general arguments is over. The Second Report and Order sets forth a clear analysis of general competitive conditions in cellular markets, and, as McCaw pointed out in its initial comments in response to the above-captioned petition, the Commission concluded that these conditions do not warrant tariff, rate or entry regulation.[4/] In order to overcome this fundamental conclusion, the states and their supporters must provide specific proof of market conditions different from the general competitive conditions described by the Commission, as well as proof that federal remedies are inadequate, and that the benefits of any

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[4/] See Opposition of McCaw Cellular Communications, Inc. to the Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates, PR Docket No. 94-105 at 12-13 (filed Sept. 19, 1994) ("McCaw Opposition").

proposed state regulation outweigh the costs.[5/] Neither Nextel nor NCRA has provided one shred of evidence on any of these issues.

Predictably, Nextel puts the main weight of its arguments against state regulation of the services which Nextel provides. Since McCaw believes that no case has been made that any CMRS provider should be subjected to state regulation, McCaw does not disagree with Nextel's self-interested concern. Nextel goes wrong, however, in its attempt to suggest that regulation of cellular carriers by the states is justifiable. In support of this proposition, Nextel merely proffers a series of general statements that cellular carriers exercise market power, and briefly alludes to the "documented lack of competition and evidence of dominant providers in some states."[6/] It offers no economic or other evidence whatsoever. This is not proof of market conditions requiring state regulation.

In support of its arguments, NCRA cites eight different "federal documents" which allegedly contain conclusions that cellular markets are not competitive. One of these documents, oddly, is the Commission's Second Report and Order, where the Commission found that "there is no record evidence that indicates a need for full scale regulation of cellular or any other CMRS offerings."[7/] Moreover, as McCaw has noted in its initial

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[5/] See id. at 12-16.

[6/] See Comments of Nextel Communications, Inc., PR Docket No. 94-105, PR File No. 94-SP3, at 13 ("Nextel Comments").

[7/] Second Report and Order at 1478.

comments, the Commission expressly concluded that forbearance from regulation of cellular carriers is appropriate, notwithstanding its concerns over the level of competition in cellular markets.

Of the seven other federal reports, many "analyze" cellular competitiveness only to the extent that they assume certain outcomes are likely based on the apparent dual-competitor -- or duopoly -- structure of the cellular industry.[8/] The reports generally predate the passage of spectrum auction legislation and do not seriously consider the competitive impact of CMRS or PCS. More importantly perhaps, all but one of them predates the Second Report and Order. McCaw submits that the Commission's analysis in the Second Report and Order is dispositive, particularly in light of the Commission's extensive analysis of the economic evidence in the record before it.

In any case, these "federal documents" are of no value in considering whether any particular state has met its burden of proof in justifying current or prospective regulation of cellular markets. NCRA cites no state-specific findings in any of these studies. Nor do any of these studies address the adequacy of federal remedies retained by the Commission, or the costs and benefits of particular regulatory responses. In short, these

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[8/] McCaw has also submitted detailed economic critiques of the conclusions contained in two of the analyses cited by NCRA. See Declaration of Bruce M. Owen on the California Petition, attached as Exhibit A to the McCaw Opposition, at 31 (critiquing conclusions in National Telecommunications and Information Administration, U.S. Spectrum Management Policy: An Agenda for the Future (1991)); id. at 39 (critiquing Congressional Budget Office, Auctioning Radio Spectrum Licenses (March 1992)).

studies simply do not address the ultimate question before the Commission: the appropriateness of specific state regulations.

II. THE COMMISSION SHOULD REJECT NEXTEL'S SUGGESTION THAT STATE REGULATION OF "DOMINANT" CARRIERS IS JUSTIFIED

Perhaps recognizing the weakness of its economic showing, Nextel also suggests that state regulation of cellular can be justified on the basis of cellular's "dominant" status.[9/] Having rejected this argument in determining to forbear from federal regulation of CMRS, the Commission should likewise dismiss it in this context.

As Nextel is surely aware, neither Congress nor the FCC found the dominant/non-dominant distinction to be relevant in regulating CMRS. Section 332(c) does not require the Commission first to classify a commercial mobile service provider as "non-dominant" to justify forbearance. Congress was well aware of the dominant/non-dominant distinction when it enacted Section 332(c).[10/] Nonetheless, when House-Senate conferees added the requirement that the Commission evaluate market conditions before it decided to forbear,[11/] they did not limit forbearance to carriers that had been declared "non-dominant." Rather, they required only that the Commission determine that forbearance will "promote competition

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9/ Nextel Comments at 11-14.

10/ See, e.g., H.R. Rep. No. 111, 103rd Cong., 1st Sess. 259, 260-61 (1993) ("House Report") (stating that the Committee was "aware" of the court decision voiding the "Commission's long-standing policy of permissive detariffing, applied to non-dominant carriers").

11/ See 47 U.S.C. § 332(c)(1)(C).

among providers of commercial mobile services."[12] In the Second Report and Order, the Commission determined that cellular providers "face sufficient competition" to justify the relaxation of certain rules traditionally applied in non-competitive markets.[13]

The Commission's refusal to apply different regulation to cellular carriers is sound, and should apply equally to the pending state petitions. Distinctions between "dominant" and "non-dominant" providers are rooted in the wired marketplace, where entrenched monopolies control a dominant share of all potential customers in the market. Such distinctions are not applicable to the wireless industry, where nascent providers have single digit shares of potential customers. Landline local exchange carriers, for example, still command virtually 100 percent of exchange service in their regions with penetration levels of approximately 94 percent, and are rightly tagged with the "dominant" label. In contrast, McCaw, the country's largest cellular carrier, has never served more than five percent of the potential subscribers on average in any of its cellular markets.

In a further attempt to preserve existing regulatory advantages, Nextel also suggests that states should be permitted to

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[12] 47 U.S.C. § 332(c)(1)(C); see also H.R. Rep. No. 213, 103rd Cong., 1st Sess. 490, 491 ("Conference Report").

[13] Second Report and Order at 1470 (citing Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd. at 4028, 4029 (1993) ("Cellular CPE Bundling Order"). See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (Fifth Report and Order), 98 F.C.C. 2d 1191, 1204, n.41 (1984) (emphasizing that cellular carriers' "ability to engage in anticompetitive conduct or cost-shifting appears limited").

impose additional regulations upon "established" mobile service providers.[14/] Such a distinction would serve no useful purpose because no CMRS provider, "established" or otherwise, possesses market power or controls bottleneck facilities. Given the emerging nationwide competition among providers of wireless services, including Nextel, there is no need to handicap the market in favor of "new" entrants. In this regard, it is worth noting that Congress specifically considered and rejected a proposal to authorize the imposition of disparate regulatory requirements on existing providers and "new [market] entrants."[15/] Likewise, in the Second Report and Order, the Commission itself considered and rejected the suggestion of Nextel and others to impose differential regulation based on a carrier's alleged market power.[16/]

In light of the clear rejection of Nextel's proposed distinctions at the federal level, the Commission must also reject such distinctions in evaluating state regulation. The Commission has determined that dissimilar regulation of mobile service providers is inconsistent with the growth and nationwide development of a competitive market for commercial mobile services.[17/] The states should not be permitted to establish such

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14/ See Nextel Comments at 12-13, 14-15.

15/ See Conference Report at 490-91.

16/ Second Report and Order at 1473-1474.

17/ Id. at 1420.

dissimilar regulation under color of Section 332(c)(3).[18/] Such a result would effectively substitute a patchwork of state-imposed regulatory classifications of CMRS providers for the uniform federal CMRS regulatory framework adopted by Congress, thereby undermining fair competition and the growth and development of commercial mobile services.

III. SUPPORTERS OF THE CPUC PETITION PROVIDE NO EVIDENCE THAT CONTINUATION OF CALIFORNIA'S REGULATORY REGIME IS NECESSARY TO PROTECT CONSUMERS

The CPUC Petition attracts predictable support from the beneficiaries of its regulatory regime. The resellers, represented by CRA, seek to preserve the preferential treatment of resellers that the CPUC has adopted as an overriding policy objective in its regulatory regime. CATA simply fears that its members may not be the parties selected as retail outlets by licensed cellular carriers. At bottom, both parties desire to protect certain classes of individual competitors at the expense of true competition. Neither has provided any economic evidence that regulation protects consumers, as opposed to their own parochial interests. In fact, the overwhelming preponderance of economic

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[18/] It is illuminating that the most recent action of the CPUC, taken just last week, creates exactly the sort of uneven regulatory burdens that Section 332 was designed to prevent. In an Interim Opinion in the CPUC's wireless communications docket, the CPUC eliminated the requirement that non-cellular CRMS providers obtain a certificate of public convenience and necessity, which cellular carriers are still required to obtain, and also decided not to impose rate regulation or tariff filing requirements applicable to cellular carriers on non-cellular CMRS providers. Interim Opinion, Investigation on the Commission's own Motion into Mobile Telephone Service and Wireless Communications, I. 93-12-2007 (October 12, 1994).

evidence and sound economic analysis establish that California's regulatory regime does not protect consumers, but rather imposes substantial costs without corresponding benefits.

The CPUC Petition has also garnered support from two organizations purporting to represent consumers, who, like consumers of any goods or services, would like to pay less for cellular service. These parties, UCAN et al. and Los Angeles County, a large government purchaser of cellular services, ignore the underlying economics of cellular markets and wrongly conclude that their subjective perceptions that cellular rates are too high are somehow evidence of a lack of competition.

Finally, in a further attempt to buttress its arguments for cellular regulation, the CPUC has publicly released some of the data originally submitted to the Commission under a request for confidentiality. This information adds little to the CPUC's Petition, and provides no justification for the authority the CPUC seeks. To the contrary, the data reveal that the CPUC's analysis of the CMRS marketplace is deeply flawed.

A. UCAN's and Los Angeles County's Subjective Perceptions of High Cellular Rates Do Not Meet The Demanding Burden of Proof Applicable to State Petitions to Preserve Regulatory Authority

Stripped to their essentials, the comments of UCAN and the County of Los Angeles make the same point: rates for cellular services are somehow "too high."[19/] Neither party makes any

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[19/] See Comments of UCAN and TURN in Support of Petition of the State of California and Public Utilities Commission to Retain State Regulatory to Retain State Regulatory Authority Over Intrastate Cellular Service Rates, PR Docket No. 94-105, PR File No. 94-SP3,

attempt to prove that market conditions in California are characterized by a lack of competition. The most these parties can do is recycle the economic analysis contained in the CPUC Petition, which McCaw has conclusively demonstrated to be unsupported and wrong.

The main evidence of the alleged lack of competition in California cited by UCAN is that California customers pay "substantially higher rates than subscribers throughout the rest of the country."[20/] At the same time, however, UCAN acknowledges a "very high demand for wireless services in California" in light of Californians' "notable" reliance on the automobile for transport and the fact that "[t]ransport is a major part of daily life for a disproportionately high number of Californians."[21/] Even assuming the accuracy of UCAN's assertion that cellular rates are higher in California, its own acknowledgment of high demand explains that phenomenon. In a competitive market, other things being equal, higher demand will result in higher rates as the most efficient means of allocating scarce resources. Regulatory tampering with market-driven prices, by contrast, will produce an inefficient allocation of resources by inflating demand for limited system capacity.[22/] The appropriate solution is to authorize additional

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at 1 ("UCAN Comments"); Comments of The County of Los Angeles, PR Docket No. 94-105, PR File No. 94-SP3, at 1 ("Los Angeles County Comments").

20/ See UCAN Comments at 2.

21/ Id.

22/ McCaw Opposition at 45.

spectrum for the provision of mobile services, which the Commission has done.

In fact, as McCaw demonstrated in its opposition, the market environment in California is far more favorable than the CPUC, Los Angeles County, and UCAN have painted it. Cellular prices are in long-term decline.[23/] Moreover, far from artificially limiting capacity in order to drive up prices, California cellular carriers have undertaken substantial investments to expand capacity.[24/]

Beyond simplistic arguments based on the relative level of cellular rates in California, UCAN and Los Angeles County merely recite the same arguments made by the CPUC in its petition, which McCaw and other parties conclusively rebutted in their oppositions. Neither UCAN nor Los Angeles County has provided any additional evidence that would help the CPUC justify its request to extend its regulation of cellular rates.

B. The California Resellers Provide No Evidence in Support of the CPUC's Petition Other than the Bare Self-Interest of Resellers

As McCaw has explained, one of the unfortunate curiosities in California's regulatory regime is a single-minded dedication to ensuring the economic survival of a favored class of competitors, resellers, without regard to whether the existence of such

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[23/] Id. at 33. See also W. Tanaka, "Cellular Phone Rates Continue to Decline," San Francisco Examiner, September 14, 1994 at B-1. Ironically, in light of the CPUC's petition, an attorney and telecommunications advisor for the CPUC acknowledged that a recently announced drop in cellular prices in San Francisco was "indicative of where wireless costs are headed and that's down." Id.

[24/] Id. at 31-32; 41-42.

resellers in any way benefits ultimate consumers.[25] Thus, the CPUC has required that wholesale cellular carriers make available favorable rates to resellers which they are expressly prohibited from providing to large customers with comparable demand, and has imposed a variety of other favorable regulatory requirements.[26] There is absolutely no economic evidence, however, that such regulation in any way benefits consumers, and substantial economic evidence that such regulatory protectionism in fact increases cost to consumers.[27]

Far from justifying the extension of this regulatory regime, CRA's comments highlight its fundamental defects. Its argument in support of continued regulation is essentially a call for protectionism:

> CRA's members operate with extremely small profit margins -- in some cases as low as one percent (1%). If the CRA's members, like CSI and Comtech, were deprived of lower wholesale rates, their profit margins would disappear and their ability to survive placed [sic] in serious jeopardy.[28]

Even if this were true, it would not constitute evidence that market conditions in California require state regulation. As McCaw demonstrated in its opposition, trends that benefit consumers may endanger resellers, whose margins will be squeezed as competition

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[25] Id. at 20-24.

[26] Id. at 21.

[27] Id. at 22-24.

[28] See Comments of Cellular Resellers Association, Inc., Cellular Service, Inc. and COMTECH, Inc., PR Docket No. 94-105, PR File No. 94-SP3, at 3 ("CRA Comments").

drives retail prices closer to production costs.[29] That the elimination of the CPUC's protectionist regime might drive some resellers out of business is evidence that the regime is protectionist, not that it is necessary to protect consumers. Competition will be most effectively enhanced by allocating spectrum for new facilities-based providers of CMRS, as the Commission has done, not by artificially preserving a favored class of competitors who add no capacity of their own.

C. The Complaints of Cellular Agents Provide No Justification for Continued Regulation

In support of the CPUC Petition, CATA claims that cellular carriers have engaged in "predatory acts and practices" allegedly intended to "achieve and increase their power over the sale and distribution of cellular equipment."[30]

As a threshold matter, these charges are entirely unsubstantiated. Cellular carriers should certainly be free, as are other businesses, to choose what they believe to be the most effective means of distributing and retailing their services. Vigorous competition by cellular carriers, even if such competition is at the expense of "small independent" agents, is not evidence of a problem requiring a regulatory solution. In fact, like the resellers, the cellular agents seem to be looking for protection from competition, rather than the freedom to compete.

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[29] McCaw Opposition at 24.

[30] See Statement of CATA Supporting the Petition of the California Public Utilities Commission to Retain State Regulatory Authority Over Intrastate Cellular Service Rates, PR Docket No. 94-105, PR File No. 94-SP3, at 3-4 ("CATA Statement").

Revealingly, a major concern of the cellular dealers seems to be that cellular carriers are undertaking direct retail sales, or have chosen "multi-outlet retailers" such as Circuit City and Sears to distribute their products.[31/] The result is that "small businesses are being driven under." It should go without saying by now that protection of competition -- not individual competitors -- is what the public interest calls for. CATA's comments are devoid of any economic evidence that competition is undermined by the carrier's retail distribution activities.

CATA's claims of predation are disproved by basic economic theory. CATA does not argue that there are any significant barriers to entry in the sale of cellular equipment. In the absence of such barriers to entry, it is well-established that predation of the sort alleged by CATA is pointless, and unlikely to be engaged in by rational economic actors.[32/] The Commission itself dismissed claims similar to CATA's in its extensive review of the joint offering of cellular service and equipment, which concluded by permitting carriers to engage in such offerings.[33/]

In any event, the conduct alleged by CATA, if established, should be addressed under the antitrust laws, not by extending unnecessary regulation. CATA apparently has already filed a

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[31/] Id. at 6.

[32/] See, e.g., Areeda and Hovenkamp, Antitrust Law, ¶ 711.2a at 658 (1993 Supp.) ("[G]reater staying power than rivals and a prospect of substantial monopoly gains -- because, for example, entry barriers are very high -- are prerequisites for the occurrence of predation.").

[33/] Cellular CPE Bundling Order, 7 FCC Rcd. at 4032.

lawsuit seeking to remedy the practices it has alleged. It should be left to pursue its remedies in the proper forum, not before the CPUC.

D. The Information Recently Disclosed by the CPUC Does Not Support its Petition and Reveals a Flawed Analysis of the CMRS Marketplace

More than one month after submitting the above-captioned petition, the CPUC disclosed some of the data for which it had originally sought confidential treatment.[34/] The data add little to the CPUC's arguments, and provide no support for its attempt to retain its regulatory authority over cellular carriers.[35/]

The additional data disclosed by the CPUC do cast substantial doubt on the validity of its analysis of the CMRS marketplace, however. Specifically, in concluding that a new subscriber would allegedly cost cellular carriers in Los Angeles and San Francisco an additional $300 in marketing but yield them $75 per month in increased operating profits,[36/] the CPUC incorrectly reports data drawn from other sources; ignores important costs associated with adding to a carrier's subscriber base; confuses average and

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[34/] See Ex Parte Letter from Ellen S. LeVine, California Public Utilities Commission to Regina Harrison, Private Radio Bureau, FCC, PR Docket No. 94-105, PR File No. 94-SP3 (September 13, 1994).

[35/] At McCaw's request, Bruce Owen of Economists, Inc. reviewed the additional data and found that they did not lead to any change in his initial conclusion that CMRS rate regulation was unnecessary in California. See Declaration of Bruce M. Owen on the Revisions to the California Petition ("Owen Declaration"), attached hereto as Exhibit A, at 1.

[36/] CPUC Petition (Revised) at 49.

marginal costs; and overstates the revenues that would be generated from additional subscribers.[37]

The CPUC also underestimates the cost of capital;[38] excludes operating costs that were included in the studies it relies upon to calculate those costs;[39] ignores the costs associated with the use of scarce spectrum[40] and subscriber churn;[41] and underestimates marketing costs.[42]

Even if the errors in the CPUC's calculations were corrected, the fact that average revenues exceed average variable costs for new subscribers does not imply that cellular systems have too few subscribers or that usage is too low. Rather, the relevant question is whether there are additional customers that have not yet subscribed that would be willing to pay the additional costs that a carrier would have to bear to add and retain them as subscribers and provide them with service.[43] Compared to costs and revenues for existing subscribers, the costs associated with attracting an additional subscriber would be higher, the revenue earned from that additional subscriber would be lower, or both.[44]

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[37] Owen Declaration at ¶ 2.

[38] Id. at ¶ 5.

[39] Id. at ¶ 6.

[40] Id. at ¶ 7.

[41] Id. at ¶ 8.

[42] Id. at ¶¶ 9-10.

[43] Id. at ¶ 11.

[44] Id.

The CPUC ignores all of this. Its mishandling of the evidence and its willingness to draw conclusions on the basis of a deeply flawed analysis further undermine its arguments in support of continued rate regulation.

CONCLUSION

None of the commenting parties supporting the CPUC Petition, nor the CPUC itself, provides any evidence upon which the Commission could find that the standard for state rate regulation has been met.

By contrast, the comments of cellular carriers clearly show that the props relied on by the CPUC to support its rate regulation request are as thin as reeds. The simple facts that characterize cellular service in California are these: rates are declining (notwithstanding regulatory impediments to innovative pricing); subscribers are being added by carriers in record numbers; profitability is reasonable, particularly in light of carriers' risks and up-front capital investments and the scarcity value of the spectrum being used; and capital investment is robust. There is no basis for concluding that market forces in California will not operate to protect consumers from unreasonable or discriminatory rates, or that the California cellular market is uniquely uncompetitive (except to the extent that chronic regulatory tinkering has interfered with vigorous competition).

For the reasons set forth above and in McCaw's opposition to the CPUC Petition, the petition should be denied.

Respectfully submitted,

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October 19, 1994

D32219.1

EXHIBIT A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services

GN Docket No. 93-252

Declaration of Bruce M. Owen
on the Revisions to the California Petition

1. I previously submitted a declaration in this proceeding which discusses my qualifications. At the request of counsel for McCaw Cellular Communications, Inc. (McCaw), I have reviewed the revisions made by the California Public Utilities Commission (CPUC) to the text of its petition for authority to regulate rates for commercial mobile radio services (CMRS). Those revisions do not lead to any change in the analysis or conclusions in my September 19, 1994, declaration on the California petition.

2. While my analysis and conclusions are unchanged, additional data provided by the CPUC reveal that it based its conclusion that cellular carriers exercise market power in part on a flawed analysis of carrier operating profits from new subscribers (Revised CPUC Petition at 49). The CPUC contends that cellular carriers in Los Angeles and San Francisco would earn $75 per month in operating profits from a new subscriber, which the CPUC implies could be obtained by spending an additional $300 on marketing. In reaching this conclusion, the CPUC incorrectly reports data drawn from other sources, ignores important costs associated with increasing the number of subscribers, confuses average and marginal